SUPREME COURT
JAN 20 1975

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1974

No. 74-890

ROBERT G. DUDLEY and MARI A. DUDLEY,

Petitioners,

vs.

D. DeJERSEY GRUT; BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO., aka RICHHOLD CHEMICAL CO.; JOE DOE I through X, and RICHARD ROE CORPORATION, I through X,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, ROBERT G. DUDLEY and MARI A. DUDLEY respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on September 24, 1974.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of California is hereto attached as Appendix A. The Memorandum Decision of the United States Court of Appeals is unpublished and is attached hereto as Appendix B.

JURISDICTION

The Memorandum Decision of the Court of Appeals for the Ninth Circuit was dated September 24, 1974. No petition for rehearing was filed. Counsel for Petitioners timely filed an Application for Extension of Time within which to file the Petition for a Writ of Certiorari and Mr. Justice Douglas entered an Order on December 18, 1974 extending the time for filing a Petition to and including January 22, 1975. This Petition is timely filed and the jurisdiction of the court is invoked under USC § 1254 (1).

The Complaint in the District Court was brought under 42 USC § § 1982, 1983 and 1985 (3, and charged that the Respondent conspired with each other to damage the business organization owned by Petitioners and thereby depriving them of their civil rights.

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it held that the three (3) years California Statute of

Limitations began to run from the date of the last conspiratorial acts of the Respondents and not from the latter date such as of the Court decision deciding the issues in favor of Petitioners?

2. Did the Court of Appeals err when it held that the date of the favorable decision in a tax case involving the claim of the IRS and the Coram Nobis Petition to relieve Petitioners is of no consequence as to the Statute of Limitations, notwithstanding the fact that both litigations were compelled to obtain relief from the results of the conspiratorial acts of Respondents.

3. Did the Court of Appeals err when it held that "there is no claim, nor could there be, that the Internal Revenue Service was a co-conspirator..." when to the contrary the Complaint made such a claim, albeit without naming the Internal Revenue Service as a Defendant.

4. Did the Court of Appeals err when it wholly disregarded Petitioners complaint that the trial court failed to order an inquiry into the identity of the petitioning creditors in the bankruptcy proceeding involving Petitioners even though it was alleged and documented that one of the petitioning creditors while claiming to be a California corporation, was in fact a creature of Delaware. Petitioners claimed that such an

inquiry into the fraud upon them and upon the court was mandatory under the Federal Fraudulent Concealment Rule.

STATEMENT OF THE CASE

The Complaint under the Civil Rights Act for damages was filed on behalf of the two named Petitioners, husband and wife, and described the husband as a designer and builder of machinery and the wife as consultant in marketing and design who were partners in the Dudley Machinery Engineering Company, which company had a large number of customers utilizing the machinery and systems designed by the husband for the canning and packaging industry. They were partners in a Consolidated Lease Company which company had a great many customers leasing Dudley-designed machinery. Petitioners, in 1951, incorporated Dudley Machinery, which company was marketing various machinery systems and products invented or designed and owned by them. This company had similarly a large number of profitable customers. Ninety percent of the stock of the company was owned by the two Petitioners.

In 1956 Petitioners incorporated Dudley Industrial Corporation, which corporation developed, researched and applied petrochemical and ceramic materials, sold its products to various builders in

*the United States, and had well-nigh a monopoly in the manufacture and sale of bath structurals, specifically one piece walled showers, baths, etc., utilizing the unique Dudley-designed "gel-coat processes." (TR-1)**

Dudley Industrial, by early 1960 was the sole source of certain of its products and supplied more than 50% of all products of this nature in this country. (TR 3-5) This corporation had extensive manufacturing and warehousing facilities leased from the City of Hollister, as well as near Hemet, leased from Riverside County, both in California. The corporation had substantial investment in dies, tooling, and other equipment needed for its production. The business of the corporation was growing almost precipitously and prior to July 1, 1960, the facilities in Riverside County, California had orders in excess of preinflation $700,000.00 for products such as seamless receptors, shower stalls, walled tubs, lavibowls, etc. The corporation also owned the trademark of "Glaceramic" which was considered in the trade a mark of excellence. (TR-5) Dudley Industrial, on the basis of its past history, expected to expand from day-to-day because of the recognized excellence of its products and would have continued to do so but for the acts of Respondents who, on or about May, 1960,

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* *TR - refers to the Transcript of Record filed in the United States Court of Appeals for the Ninth Circuit.*

entered into a conspiracy with each other and with their fellow co-conspirators for the purpose of eliminating Dudley Industrial from the field of the polyester Fiberglas reinforced fixture market. (TR 6-10) Dudley Industrial insisted upon maintaining a high manufacturing standard and refused to agree to lower such standard notwithstanding all attempts on the part of the Respondent and their co-conspirators. The lowering of the standards would have permitted Respondents and their co-conspirators to obtain approval of the use of their products by certain authorities which approval was at that time solely had by Dudley Industrial. (TR 7-10)

To accomplish the conspiracy Respondents pretended that they were anxious to maintain and advance the cause of Dudley Industrial and for that purpose they recommended that certain managerial employees be employed by Petitioners and when Petitioners, agreed to this plan, Respondents and their co-conspirators, with the help of the managerial employees recommended by them, took over the facilities of Dudley Industrial in Santa Clara, the manufacturing and warehousing facilities in Hollister and also the facilities in Hemet. Petitioner, ROBERT at that time President, and Petitioner MARI at that time Treasurer of

Dudley Industrial, were totally excluded and locked out from the corporation facilities and refused access to the books and records from on or about June 21, 1960. (TR 19-20)

One of the managerial employees recommended by Respondent and their co-conspirators was Respondent GRUT who pretended that he represented substantial financial interests and that he was ready, willing and able to provide additional financial contribution for the enlargement of the business of Dudley Industrial, (TR 23-24) while said GRUT at all times was striving to bring about the elimination of Petitioners from Dudley Industrial.

The complaint also alleges at the time when Petitioners were excluded from the facilities Dudley Industrial had raw material valued at about $25,000.00, manufactured products of a list value of $100,000.00, accounts receivable about $55,000.00, and other on hand in the amount of about $1,300,000.00, tooling on hand was valued at about $400,000.00. The corporation also owned the valuable leasehold and improvements at Hollister and in Riverside County. (TR 21) In spite of the efforts of Petitioners to regain control of Dudley Industrial, they were unable to do so. Respondents and their co-conspirators brought about the filing of an involuntary bankruptcy

proceeding against Dudley Industrial on or about the 15th of September, 1960, (TR 21) and Petitioners objected to the proceedings because Dudley Industrial was solvent and also because one of the three alleged creditors was not a creditor at all and thus the proceedings were, for a short while, frustrated. (TR 21-22)Subsequently the Referee in Bankruptcy granted leave to substitute for the "non-creditor" petitioning creditor a creditor. During the proceedings Dudley Industrial was denuded of all of its assets as well as its future prospects. In addition, Petitioners were also caused to lose all their personal assets, including their home in Los Altos, California. By such conspiratory actions of the Respondents and their co-conspirators, Petitioners alleged that they were deprived of their livelihood and were deprived of the equal protection of the law in violation of the Civil Rights Act. (TR 22) The conspirators also instigated certain proceedings which caused Petitioners at that time and in the future a great deal of harassment and also resulted in the conviction of Petitioner ROBERT G. DUDLEY of an alleged criminal offense against the State of California.

One act of the conspirator was to withhold from the Internal Revenue Service a check of Dudley Industrial in the amount of $7,466.21, which

Petitioners paid on behalf of Dudley Industrial for Social Security and Withholding Taxes. The withholding of such check by the managerial employees recommended to be employed by Respondents was without any authority and was made possible by the conspiratorial assistance of the Bank of America, California. (TR 23)

Respondent GRUT was also successful in inducing the District Attorney of the County of Santa Clara to file a criminal complaint against Petitioner ROBERT G. DUDLEY, which complaint charged that he "knowingly withheld the deductions required by Division 1 of the California Unemployment Code from remuneration paid to his workers." Petitioners, being without any resources, were unable to employ an attorney and none was appointed for them by the court so the accused Petitioner defended himself and he was found guilty of the offense charged against him in the Municipal Court of San Jose/ Alviso Judicial District. (TR 24)

Later Petitioners became confirmed in their assertion that ROBERT G. DUDLEY was not the responsible officer and therefore not responsible for the criminal act charged against him in said Municipal Court when the United States Court of Appeals in 428 F2d 1196 so held in the case of Robert G. Dudley v. United States. Thereupon he

filed a Petition for a Writ of Error Coram Nobis to relieve himself of the criminal conviction, which petition was pending at the time of the filing of the complaint. (TR 24)

While Petitioners were wholly excluded from the facilities of Dudley Industrial, nevertheless Respondents' co-conspirator the Internal Revenue Service claimed that Petitioner ROBERT G. DUDLEY is responsible pursuant to Section 6672 of the Internal Revenue Code of 100% penalty of the taxes allegedly due from the Dudley Industrial in the amounts of $6,049.07 and $6,943.54 respectively for the first and second quarter of 1960. Petitioner protested against such claim but in vain (TR 25), and in fact, the Internal Revenue Service filed a Notice of Levy with the Security National Bank of Monterey County, where Petitioner maintained their account for Consolidated Lease owned by them and obtained therefrom the sums of $3,595.85 and $138.40, for a total of $3,734.24. (TR 26) Petitioner filed a claim for refund with the Internal Revenue Service, which refund was refused and in further harassment of Petitioners, the Internal Revenue Service placed a Notice of Levy with certain suppliers and customers of Petitioners.

The Internal Revenue Service served notice upon one Mark R. Ingli who was at that time engaged by Petitioners to manufacture certain equipment

for Dudley Machinery and thus damaged the business relationship between them and the supplier in accordance with the conspiracy heretofore mentioned. (TR 26-27) The Internal Revenue Service also claimed that it was in possession of a list of name and addresses of individuals and companies who were customers of the Petitioner and that it intended, and as Petitioners were informed, did communicate with them falsely claiming that there was a penalty claimed against Petitioner ROBERT G. DUDLEY in the amount of $16,465.55, which claim was made in carrying out the conspiracy mentioned. (TR 27)

The complaint alleged that to bring about the end of the continued harassment of Petitioners by the Internal Revenue Service they filed a civil action in the United States District Court for the Northern District of California wherein they asked for a declaratori judgment, that they are not indebted in any amount to the Internal Revenue Service under Section 6672 of the Code. (TR 28)

The trial court entered a judgment adverse to Petitioner ROBERT G. DUDLEY who appealed to the United States Court of Appeals for the Ninth Circuit, which court on July 7, 1970 reversed the judgment of the trial court holding that ROBERT G. DUDLEY, because of the action

of the Respondents and their co-conspirators "no longer had significant control over the corporation ... (and therefore) ... is not personally liable for payment under 26 USC Paragraph 6672." (TR 28) The Court also ordered the trial court "to grant Petitioners' claim for refund and to dismiss Respondents (i.e., the Internal Revenue Service) counter-claim." (TR 29) Respondents' petition for a rehearing was denied on August 12, 1970 and Respondents then filed a petition before this Honorable Court for extension of time during which they may file a Petition for a Writ of Certiorari. Subsequently and before the last day of December, 1970 Petitioner ROBERT G. DUDLEY was informed that Respondents will not proceed with the filing of a Petition and thus the judgment of the Court of Appeals became final. (TR 29)

The complaint details the sales volume of Dudley Industrial prior to the wrongful bankruptcy, (TR 6-7), and its expected earnings. (TR 7-8) It sets forth the losses suffered by Petitioners in the amount of $4,410,000.00 (TR 8), and it sets forth the particular actions taken by the various Respondents pursuant to the conspiracy, (TR 8-10) (TR 10-12) (TR 12-13) (TR 13-14) (TR 14-16) and the acts of the conspirators who were not made party (pages 16 to 19).

> *The complaint also alleges that the: "damages suffered by the plaintiffs (petitioners) because of the illegal conspiratorial acts of the defendants (respondents) and their co-conspirators are continuing in nature and are extremely difficult to ascertain exactly since the same pertains to loss and profits and in fact pertains to the well-nigh total destruction of plaintiffs (petitioners) various businesses and therefore the plaintiffs (petitioners) pray that upon the trial of the case they shall be permitted to amend their claim to conform to proof." (TR 30)*

The complaint alleges that because of the act of the Respondents conspirators the Petitioners suffered damages in the amount of $12,600,000.00 (TR 30. That as a direct act of the Respondents and their co-conspirators in violation of Title 42 USC Paragraph 1985 (3) Petitioners were denied the equal protection of the laws; they are entitled to exemplary damages in the amount of $1,000,000.00 plus $4,410,000.00 (property loss as set forth on page 8 of the complaint) for a total of $5,410,000.00. The complaint prays for compensatory damages in the amount of $12,600,000.00 plus $4,400,000.00 for a total of $17,010,000.00 and also asked for punitive damages of $1,000,000.00 and they also asked for reason-

able attorney fees and costs. (TR 30-31)

Respondents moved the court to dismiss the complaint on various grounds, all of them claiming that the action complained of accrued without the Statute of Limitation. (The trial court granted the motion on the sole ground that the complaint is untimely under the applicable statute. (TR 233).)

Respondent Coast Manufacturing Co., in addition, moved to vacate service of process on the ground that:

> *"is not now nor has ever been an officer of Coast Manufacturing Co., or an agent thereof able to accept service on its behalf and further that the corporation designated by plaintiffs as Coast Manufacturing Co., was not in existence at the time of the alleged acts and did not exist until October 21, 1968." (TR 36)*

The motion to vacate service has attached to it a copy of the Articles of Incorporation of Coast Manufacturing & Supply Co. showing that the same was filed with the Secretary of State on October 24, 1968. (TR 42-45) This claim was contrary to the bankruptcy petition which petition was filed by three alleged creditors, among them "Coast Mfg. & Supply Co." concerning which it was stated that:

"...Coast Mfg. & Supply Co. is a corporation duly recognized and existing under and by virtue of the laws of the State of California and has its principal place of business in the City of Livermore, County of Alameda, State of California." (TR 73)

Petitioners then countered that the claim made in the bankruptcy petition that Coast Mfg. & Supply Co. was a California corporation was and is false and in fact there was no such California corporation, and there was no such creditor. The "filing of said creditors' petition was a fraud not only upon the alleged bankrupt and on the plaintiffs (Petitioners) herein but upon the court, too." (TR 14)

Petitioners alleged that the information which came to their attention only after the filing of the Coast motion to vacate process makes it an issue "whether or not Dudley Industrial Co., a corporation alleged bankrupt was properly before the bankruptcy court with a creditors' petition which falsely described one of the petitioners creditors as a 'California corporation,' when in fact the truth it was a Delaware corporation." They also alleged that the bankruptcy procedure rights to be held wholly void and of no effect. (TR 142)

The trial court filed its Order Granting Respondents' Motion to Dismiss holding that it had:

"... grave doubts that the tortuous conduct alleged in the complaint provides a basis for a civil rights action under paragraph 1985 (3), or any of the other civil rights provisions. But since all defendants have joined in a meritorious challenge to the complaint that it is barred by the applicable statute of limitations, the court need not consider the other questions." (TR 231)

Petitioners filed their timely Notice of Appeal which appeal was decided adverse to them as seen from Appendix "B".

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CONFLICT WITH THE HOLDINGS OF THE OTHER CIRCUITS. FURTHERMORE, THE TOTAL DISREGARD OF THE FEDERAL FRAUDULENTS CONCEALMENT RULES IS CONTRARY TO THE HOLDING OF THIS COURT.

1 & 2. The paramount issue is the question of the start of the running of the three (3) years of Statute of Limitations. Does the statute start to run, as the courts below held, from the date of last act of the conspirators, or does it start to run from the time when Petitioners finally obtained relief from the results of the acts of the Respondents?

Two significant issues have patent consequence. One is the conspiratorial acts of Respondents who thereby were able in 1960 to bring about the harassing action of their co-conspirator the Internal Revenue Service. (TR 23, 26, 27) The harassment continued until the decision holding in favor of Petitioners was filed on August 12, 1970 by the United States Court of Appeals in Dudley v. United States, 428 F.2d 1196, and which decision became final in December 1970 when the Internal Revenue Service abandoned its attempt to obtain a Writ of Certiorari in this Court.

Petitioners submit that the conspiratoral acts of Respondents and their co-conspirator the Internal Revenue Service (TR 27) were continuous until December 1970 and that therefore the three years Statute of Limitations did not start before then and the complaint was timely filed. Richard v. McDonald, 469 F2d 1249 (8th Ct.) Savage v. United States, 450 F2d 449 (8th Ct.).

A further conspiratoral act is alleged to be continuous when Petitioner ROBERT G. DUDLEY was charged as the "responsible officer" of Dudley Industrial who failed to pay the California Taxes due on the corporation employees. (TR 16) The issue was not resolved until 1970, when the United States Court of Appeals held in

Dudley v. United States, supra, that Petitioner ROBERT G. DUDLEY was not the responsible officer of the corporation because he, pursuant to the conspiracy of Respondents, was excluded from the management. On the basis of the decision of the United States Court of Appeals Petitioner ROBERT G. DUDLEY filed his Petition for Coram Nobis to obtain relief from the criminal conviction in 1970, which Petition was pending at the time of the filing of the Complaint. The Statute of Limitations did not start running until the proceedings for Coram Nobis were decided, thus the Complaint was timely filed contrary to holding of the United States District Court (Appendix "A") and of the Court of Appeals (Appendix "B") as it was held in Richard, supra, and Savage, supra.

3. The refusal of the District Court to inquire into the alleged bankruptcy proceedings and the total disregard by the Court of Appeals the Federal Fraudulent Concealment Rule, conflicts with the decisions of the various Courts of Appeal and of this honorable Court.

It was during the proceedings in the District Court in 1972, when Petitioners first discovered that one of the three petitioning creditors, claimed to be a California corporation, while in fact there was no such corporation chartered by California. Petitioners rightly claimed therefore that: "It

"It becomes an issue whether or not Dudley Industrial -- was properly before the bankruptcy court..." (TR 142)

Petitioners requested the trial court to inquire into the alleged fraud practiced upon them and upon the court. The trial court refused to inquire and thus acted contrary to the letter and the spirit of the Federal Fraudulent Concealment Rule. Exploration Co. v. United States, 247 US 435, 38 S.Ct. 571; Holmberg v. Armbrecht, 327 US 392, 66 S.Ct. 582.

Petitioners submitted below and resubmit it here that where a Statute of Limitations is applicable to a federally created right the holdings of the various courts is to the effect that the Federal Fraudulent Concealment Rule applies and that the Statute does not begin to run until the discovery of facts giving some notice of the fraud. Tobacco and Allied Stocks v. Transamerican Corp. 244 F.2d 902, Crummer Co. v. DuPont, 223 F2d 238. See also Holmberg v. Armbrecht, supra, pp. 584-5. As to proceedings in bankruptcy see 11 USC 1 [ff]. An inquiry is required in law and equity. The refusal of it damaged Petitioners.

Petitioners submit that they were wrongfully denied their Day in Court and such denial cannot be reconciled with the decisions of the other courts, nor with the decisions cited of this Honorable Court.

CONCLUSION

For the reasons set forth above a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

FRANCIS HEISLER
Counsel for Petitioners

January 14, 1975
Carmel, California

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-72 1021 ACW

ROBERT G. DUDLEY and MARI A. DUDLEY,

Plaintiffs,

vs.

D. DeJERSEY GRUT, et al.,

Defendants.

[Filed November 14, 1972]

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The plaintiffs in this action have filed suit under the Civil Rights Act, 42 U.S.C. §§1982, 1983, and 1985. They claim that defendants, through a series of concerted actions, destroyed plaintiffs' business and business reputation and forced plaintiffs into bankruptcy. Plaintiffs further allege they were prosecuted by the state of California and had penalties assessed by the Internal Revenue Service for failure to pay certain taxes arising out of their former businesses. State action is alleged on the basis of the tax actions and the termination of certain leases by the city of Riverside, California, and the county of San Benito, California. A

private conspiracy is also alleged.

Defendants have filed motions to dismiss the complaint on various grounds. Like the court in Savage v. United States, 450 F2d 449 (8th Cir. 1971), we have grave doubts that the tortious conduct alleged in the complaint provides a basis for a civil rights action under § 1985 (3), or any of the other civil rights provisions. But since all defendants have joined in a meritorious challenge to the complaint on the grounds that it is barred by the applicable statute of limitations, the Court need not consider the other questions.

It has long been held that a motion to dismiss is an appropriate means of raising the defense of bar by statute of limitations when it appears from the complaint that the statute has run. Sackow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F2d 196, 204 (9th Cir. 1950), cert. denied 340 US 943 (1951). Since §§ 1982, 1983 and 1985 do not contain a statute of limitations, we look to California law to determine the applicable period. For actions upon liabilities created by statute, California provides a three year statute of limitations. Code Civ. Proc. § 338 (1) (West Supp. 1972). That period is applicable to federal civil rights actions. Mills v. Small, 446 F.2d 249 (9th Cir. 1971); Smith v. Cremins, 308 F2d 187 (9th Cir. 1962).

Plaintiffs agree that three (3) years is the appropriate period of limitations, and apparently concede that most of the overt acts alleged in the complaint occurred in 1960-61. They rely, however, on two judicial proceedings to bring this alleged conspiracy within the limitations period.

First, plaintiffs point to a decision by the Court of Appeals for the Ninth Circuit reversing a decision of this Court in the case of Dudley v. United States, 428 F2d 1196, (9th Cir. 1970) rev'ing 285 F.Supp. 979. That decision was handed down on July 7, 1970. A rehearing was denied on August 12, 1970. Plaintiffs rely on language in Savage v. United States, supra, for the proposition that the last effective date is the date "when the proceedings upon which the action is based are terminated in favor of the defendant therein." (450 F2d at 451) Since this complaint was filed on June 5, 1972, plaintiffs contend that they were well within the three year limitation period.

The language quoted from Savage referred to a statute of limitations for the common law tort of malicious prosecution. The last effective date in that case was the date of dismissal of a criminal indictment by the trial court, not the reversal of a civil judgment in favor of the defendants by an appellate court. Savage thus does

not apply to the present case. As the court made clear in Lambert v. Conrad, 308 F2d 571 (9th Cir. 1962), where a civil conspiracy is alleged under the Civil Rights Act, "[t]he last possible date from which the period could have commenced to run was that of 'the last overt act alleged from which damage could have flowed . . .' Hoffman v. Halden, 268 F2d 280, 303 (9th Cir. 1959)". (308 F2d at 571) The granting of relief by an appellate court in an action instituted by the aggrieved party is not such an overt act.

Plaintiffs' second alleged act involves the filing of a criminal complaint against plaintiffs in 1961. That action terminated eleven years ago. Plaintiffs' pending attempt to receive relief from that conviction through institution of coram nobis proceedings is a separate act which by its nature cannot result in further injury to plaintiff.

Nor is either of these acts "state action" within the meaning of § 1983. The tax suit involved federal law only, and was instituted by plaintiff. Although the state prosecution was a state action, it was terminated in 1961. Plaintiffs' coram nobis action is an entirely separate proceeding for purposes of the three year statute of limitations.

Accordingly, defendants' motion to dismiss the complaint as untimely under the applicable

statute of limitations is hereby GRANTED.

Dated: November 14, 1972.

/s/ Albert C. Wollenberg
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT G. DUDLEY and MARI A. DUDLEY,
Plaintiffs-Appellants,

vs.

D. DE JERSEY GRUT, BANK OF AMERICA, NATIONAL TRUST & SAVINGS ASSOCIATION; et al.,
Defendants-Appellees.

No. 73-1198

[September 24, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: TRASK and SNEED, Circuit Judges,
and GRAY, District Judge*

MEMORANDUM

This appeal is taken by Robert G. Dudley and Mari A. Dudley from an order of the District Court dismissing their complaint brought under 42 U.S.C. §§ 1982, 1983 and 1985(3) upon the ground that the complaint disclosed that the action was barred by the applicable statute of limitations. We affirm.

The complaint alleges generally that appellants had substantial interests in Dudley Industrial Corporation and Dudley Machinery, both corporations, and Consolidated Lease Company, a partnership. The defendants D. De Jersey Grut; Bank of America, National Trust & Savings Association; The First Na-

*Honorable William P. Gray, United States District Judge from the Central District of California, sitting by designation.

tional Bank of San Jose; Coast Manufacturing Company; Fireside Thrift Company; Reichhold Chemical Company; conspired with each other to damage the business organizations of the appellants thereby depriving the Dudleys of their civil rights.

The conspiracy was alleged to have been entered into on or about May 1960. The motive was asserted to have been to eliminate Dudley Industrial Corporation from the field of the polyester fiberglass reinforced fixture market. The first act in furtherance of the conspiracy was a recommendation to and persuasion of the appellants to employ managerial employees selected by conspirators. These employees then took over control of the plant facilities and excluded and locked out appellants and refused them access to the corporate books and records. It is alleged that these acts took place on or about June 21, 1960.

Appellants further allege that appellees, acting as co-conspirators, brought about the filing of an involuntary bankruptcy proceeding against Dudley Industrial Corporation. This occurred on or about September 15, 1960, and the corporation was subsequently declared bankrupt on November 30, 1961.

A third alleged act of the conspiracy occurred when the managerial employees of the appellees who were in charge withheld from the Internal Revenue Service a check of Dudley Industrial Corporation in the amount of $7,466.21, which appellants paid on behalf of Dudley Industrial Corporation to cover Social Security and Withholding taxes. As another part of this conspiratorial mismanagement scheme it is alleged that appellee Grut induced the District Attorney of Santa Clara County to file a criminal complaint against Robert G. Dudley charging violation of the California Unemployment Code. Because he was unable to employ an attorney he alleges he was found guilty of the charge in Municipal Court. Subsequently a Writ of Error, Coram Nobis was applied for to set aside the conviction. This proceeding is still pending.

Assuming, arguendo, that any one of the first three allegations of conspiratorial wrongdoing would support a civil rights claim of the plaintiffs, they occurred approximately 12 years prior to the date the action was filed on June 5, 1972. The Federal Civil Rights Act contains no statute of limitations and state law therefore controls the limitation period. *O'Sullivan v. Felix,*

233 U.S. 318 (1914). The period within which a civil rights action must be filed under California law is three years. Cal. Code Civ. Proc. § 338(1) (West Supp. 1972); *Mills v. Small*, 446 F.2d 249 (9th Cir. 1971); *Donovan v. Reinhold*, 433 F.2d 738 (9th Cir. 1970).

Appellant seeks to extend that limitation period by having it dated from the time at which he instituted his action for coram nobis, or from the date at which he sought relief from the Internal Revenue Service. But time is computed not from the date upon which the plaintiffs took action on their own behalf. Time from which the limitations period runs is the date of the last overt act of the conspirators from which damage could have flowed. *Strung v. Anderson*, 452 F.2d 632 (9th Cir. 1971); *Lambert v. Conrad*, 308 F.2d 571 (9th Cir. 1962). There is no claim, nor could there be, that the Internal Revenue Service was a co-conspirator in seeking to assess a tax deficiency. Both the tax action and the coram nobis action were proceedings instituted and prosecuted by the appellants and not by the alleged conspirators.

Although we, like the District Court, have grave doubts that any of the conduct alleged would if proved constitute a civil rights claim, we find it unnecessary to consider the point.

The judgment is affirmed.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No. 74-890

ROBERT G. DUDLEY and MARI A. DUDLEY,
Petitioners,

vs.

D. DEJERSEY GRUT; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO., aka RICHHOLD CHEMICAL CO.; JOE DOE I through X, and RICHARD ROE CORPORATIONS, I through X,
Respondents.

RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petition for Writ of Certiorari sets forth the unpublished opinions below. The decision of the United States District Court for the Northern District

of California is attached thereto as Appendix "A" and the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is attached thereto as Appendix "B".

JURISDICTION

The complaint filed in the District Court was brought under 42 U.S.C. §§1982, 1983, and 1985 (3) and charged that Respondents conspired with each other to damage the business organization owned by Petitioners thereby depriving them of their civil rights. The District Court dismissed the complaint on the ground that it was barred by the Statute of Limitations. Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court. Thereafter, Petitioners filed their timely Petition for a Writ of Certiorari.

QUESTION PRESENTED

Is Petitioners' alleged claim barred by the admittedly applicable California three year Statute of Limitations?

STATEMENT OF THE CASE

Petitioners have provided the Court with a detailed summary of their thirty page complaint, as well as the other pleadings and documents on which they rely.

The main thrust of the complaint is that the Respondents wrongfully conspired to invoke the bankruptcy laws of the United States against Dudley Industrial Corporation which was substantially owned by Petitioners. The purpose of the alleged conspiracy was to eliminate Dudley Industrial Corporation from the field of polyester fiberglass reinforced fixture market. Petitioners alleged the conspiracy is continuous and that the damage suffered by them, together with the relief they sought from the consequences of 1961 bankruptcy of Dudley Industrial Corporation, prevents their claim from being barred by the Statute of Limitations.

ARGUMENT

The last overt act of the Respondents set forth in the complaint occurred in 1961. Petitioners have tried unsuccessfully to circumvent the Statute of Limitations which is admittedly three years. California Code of Civil Procedure, §338(1): *Donovan v. Reinhold*, 433 F.2d 738 (9th Cir. 1970). They make three separate arguments which are set forth in their Petition as the second, third, and fourth Questions Presented. (Petition for Writ of Certiorari, at pp. 2-4) Petitioners' first question is answered in the subsequent arguments. Petitioners' second question relates to the two legal proceedings wherein Petitioners sought relief from the alleged conspiracy. Petitioners filed a successful action against the Internal Revenue Service for refund of federal taxes (*Dudley v. U. S.*, 428 F.2d 1196 (9th Cir. 1970) and Petitioner Robert G. Dudley unsuccessfully sought a *Coram Nobis* Peti-

tion to the State Court in California to relieve him from a criminal conviction for the non-payment of employer taxes. Petitioners' third question relates to their pleading that the Internal Revenue Service was a co-conspirator, although they did not name the Internal Revenue Service as a defendant. Petitioners' fourth question relates to their invocation of the Federal Fraudulent Concealment Rule because one of the petitioning creditors in the bankruptcy proceeding was mistakenly designated as a California corporation, when in fact it was a Delaware corporation. These same arguments were unsuccessfully presented to the United States Court of Appeals for the Ninth Circuit.

Bank of America National Trust and Savings Association wishes to point out that the law on these points was fully argued to the Court of Appeals. No significant new authorities have been brought forth by Petitioners. Therefore, Bank of America National Trust and Savings Association incorporates by reference as Appendix "A" its Brief to the Court of Appeals, both for its statement of law and in support of its contention that the Court of Appeals had the benefit of Petitioners' arguments being fully presented.

More importantly, Petitioners' mere assertion that the decision below is not in harmony with other Circuits and in disregard of this Court's decisions involving the Federal Fraudulent Concealment Rule should be tested against the intent of the Court's Rule Nineteen. A review on Writ of Certiorari is not a

matter of right, but of sound judicial discretion. ***Fay v. Noia,*** 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (N.Y. 1963). Petitioners' complicated claim raises no important questions of federal law which must be decided by the Court. "Special and important reasons", within this rule relating to granting of *certiorari*, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. ***Rice v. Sioux City Memorial Park Cemetery,*** 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (Iowa 1955). Here both the District Court and the Court of Appeals have commented that they had grave doubt as to whether Petitioners have even stated a claim upon which relief can be granted. Certainly this is not the type of case which requires this Court's intervention. Finally, Petitioners have made no substantial showing that the decision of the Court of Appeals is in conflict with other Circuits or with this Court's decision.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
February 18, 1975.

Respectfully submitted,
ELDON C. PARR,
Attorney for Respondent Bank of America National Trust and Savings Association.

(Appendix "A" Follows)

Appendix "A"

No. 73-1198

United States Court of Appeals

For the Ninth Circuit

ROBERT G. DUDLEY and MARI A. DUDLEY,
Plaintiffs-Appellants,

vs

D. DEJERSEY GRUT; BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO.; aka RICHHOLD CHEMICAL CO.; JOHN DOE I through X and RICHARD ROE CORPORATIONS, I through X,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLEE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

WILLIAM S. MACKAY,
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No. 73-1198

United States Court of Appeals
For the Ninth Circuit

ROBERT G. DUDLEY and MABI A. DUDLEY,
Plaintiffs-Appellants,

vs.

D. DEJERSEY GRUT; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO.; aka RICHHOLD CHEMICAL CO.; JOHN DOE I through X and RICHARD ROE CORPORATIONS, I through X,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLEE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

STATEMENT OF THE CASE

Plaintiffs have brought suit under the provisions of the Federal Civil Rights Act, specifically 42 U.S.C. §§1982, 1983 and 1985(3), against defendant Bank of America National Trust and Savings Association, a national banking association (hereinafter called Bank),

and the co-defendants alleging a conspiracy to interfere with various business interests of the plaintiffs. Upon motion by defendants, the Court dismissed the complaint on the grounds that the complaint was untimely under the applicable statute of limitations. Plaintiffs have appealed from this dismissal.

The main thrust of the complaint is that the defendants wrongfully conspired to invoke the bankruptcy laws of the United States against Dudley Industrial Corporation, which was substantially owned by the plaintiffs. The purpose of the alleged conspiracy was to eliminate Dudley Industrial Corporation from the field of the polyester fiberglass reinforced fixture market. Plaintiffs' argument on appeal is that the alleged conspiracy is continuous and the damages suffered by them, together with the relief they sought from the consequences of the 1961 bankruptcy of Dudley Industrial Corporation, prevent their claim from being barred by the statute of limitations.

The complaint sets forth three major sets of allegations. The first set relate the organization and the success of plaintiffs' business activities prior to June 1960. The second set relate to the alleged activities of the defendants beginning in 1960 which included the exclusion of the plaintiffs from the management of Dudley Industrial Corporation and resulted in the involuntary bankruptcy proceedings begun in September of 1960. The third set of allegations relate to the difficulties suffered thereafter by the plaintiffs, particularly plaintiff Robert G. Dudley. These difficulties included a penalty assessment against him for non-

payment of social security taxes due, and proceedings against him by the State Labor Department for non-payment of wages ending in a criminal conviction in 1961. The last overt act of any of the defendants was alleged to have occurred in 1961.

QUESTIONS INVOLVED

(1) Did the District Court correctly dismiss the complaint as being untimely under the appropriate statute of limitations?

(2) If not barred by the statute of limitations, does the complaint state a claim on which relief can be granted?

ARGUMENT

I

THE DISTRICT COURT WAS REQUIRED TO DISMISS THE COMPLAINT BASED ON THE RECORD BEFORE IT

The dismissal of the complaint herein was proper based on the statute of limitations because the complaint shows on its face that the overt acts alleged occurred more than ten years ago. *Suckow Borax Mines Consolidated v. Borax Consolidated*, 185 F.2d 196, 204 (9th Cir., 1950) cert. denied, 340 U.S. 943 (1951). Further, the complaint does not state a claim upon which relief can be granted under the Federal Civil Rights Act because at most plaintiffs allege a private conspiracy against rights which are not protected by the Federal Constitution.

II

THE APPROPRIATE STATUTE OF LIMITATIONS IS THREE YEARS AND RUNS FROM THE LAST OVERT ACT OF THE DEFENDANTS FROM WHICH DAMAGE CAN RESULT.

The Federal Civil Rights Act contains no statute of limitations. When this occurs it is well settled that state law controls. *O'Sullivan v. Felix,* 233 U.S. 318 (1914), *Morgan v. Kock,* 419 F.2d 993 (1969), *Baker v. F & G Investment,* 420 F.2d 1191 (1970). The appropriate statute of limitations for a federal civil rights action under California law is three years. C.C.P. §338(1). *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962), *Donovan v. Reinhold,* 433 F.2d 738 (9th Cir. 1970), *Mills v. Small,* 446 F.2d 249 (9th Cir. 1971).

Where a civil conspiracy is alleged under the Federal Civil Rights Act the statute of limitations begins to run from the last possible date on which there is an overt act on the part of the defendants from which damage can flow. *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959). The mere allegation of a continuous conspiracy is insufficient to avoid the statute of limitations, *Lambert v. Conrad,* 308 F.2d 571 (9th Cir. 1962).

III

THE RELIEF GRANTED THE PLAINTIFF IN ROBERT G. DUDLEY v. U. S., 428 F.2d 1196 (9th Cir. 1970) DOES NOT CONSTITUTE AN OVERT ACT OF THE DEFENDANTS FROM WHICH DAMAGE CAN RESULT.

The federal suit filed by Robert G. Dudley which resulted in his relief from a tax penalty in 1970 is

not material for the purposes of determining when the statute of limitations starts. A careful reading of *Dudley v. U. S., supra,* shows that the key element of the penalty proceeding is the willful failure to pay federal taxes and a "voluntary, conscious and intentional action to prefer other creditors of the corporation over the United States." The Court looked to the fact that the plaintiff, while in control of Dudley Industrial Corporation, had made a substantial effort to pay the taxes which were due. The Court points out that plaintiff had drawn a check in favor of the United States and mailed it to the Internal Revenue Services on May 1, or May 2, 1960. The check was not presented for payment until June 10, 1960 when it was refused payment because of insufficient funds. Plaintiff was not found to have actual notice of the dishonor until July 1960 by which time he was replaced as the responsible officer of the corporation. Plaintiff had, therefore, complied with the federal tax law and had not preferred another creditor over the United States while he was in control of the corporation's finances. Nowhere in the case is there any indication that the defendants had acted wrongfully in dealing with the corporation or that any act was committed by them after 1961. Therefore, for the purposes of tolling the statute of limitations, *Dudley v. U. S., supra,* did not constitute an overt act of the defendants from which further damage to the plaintiffs could result.

Plaintiffs argue that based on *Savage v. U. S.,* 450 F.2d 449 (8th Cir. 1971) the statute of limitations

did not run until after the favorable decision in *Dudley v. U. S., supra,* on the grounds that such a favorable decision is somehow necessary to complete the required elements of their present claim. *Savage v. U. S., supra,* involved a claim under the Federal Civil Rights Act which alleged a wrongful violation of plaintiff civil rights resulting from malicious prosecution. It is hornbook law that one of the required elements needed to maintain a cause of action for malicious prosecution is that the plaintiff has received a favorable judgment which is final. *Savage v. U. S., supra,* is distinguishable from this case on the grounds that malicious prosecution was a common law tort and the plaintiffs' claim is based solely on statute. *Lambert v. Conrad, supra,* and *Hoffman v. Halden, supra.* Plaintiff's effort to minimize the consequences of the bankruptcy was not an overt act of the defendants from which further harm could occur.

IV

PLAINTIFF'S CORAM NOBIS PROCEEDING WAS NOT AN OVERT ACT OF THE DEFENDANTS FROM WHICH HARM COULD RESULT.

Plaintiff stated that he was convicted in the Municipal Court for San Jose-Milpitas Judicial District, County of Santa Clara, State of California, in 1961. The conviction was final at that time. In 1971 plaintiff petitioned the State Court for a writ of error *coram nobis* urging his conviction be set aside. The basis for his petition was that the Federal Court

found him not to be in control of the Dudley Industrial Corporation at the time the federal taxes were due in 1960. Since plaintiff was not liable for federal tax penalty he argued he was not liable for 1960 wages which resulted in his conviction. This argument fails for the same reason as the last. The relief sought by plaintiff was not an act of the defendants from which damage or harm could result to plaintiff. The damage, if any, occurred in 1961 when the plaintiff was convicted. Were the Court to accept plaintiff's theory, the Court would effectively allow the plaintiff to avoid the statute of limitations simply by initiation of a separate Court proceeding which is, in essence, a collateral attack on a prior judgment.

V

THE FEDERAL FRAUDULENT CONCEALMENT RULE IS NOT APPLICABLE BECAUSE IT IS IMMATERIAL IN THIS PROCEEDING WHETHER A PETITIONING CREDITOR IN THE LONG SINCE CONCLUDED BANKRUPTCY ACTION IS A DELAWARE CORPORATION QUALIFIED TO DO BUSINESS IN CALIFORNIA RATHER THAN A CALIFORNIA CORPORATION AS ALLEGED IN THE BANKRUPTCY PETITION.

The federal fraudulent concealment rule states simply that the time period does not begin to run for the purposes of the statute of limitations until the defrauded party has or should have had knowledge of the facts. *Baily v. Glover*, 88 U.S. 342 (1867). It has been re-stated more recently as one who conceals material facts and thereby prevents the discovery of his wrong, or the fact that a cause of action has accrued against him, is not permitted to assert the

statute of limitations as a defense for the period of concealment. *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962).

Plaintiffs claim that the federal fraudulent concealment rule is applicable because after the filing of their complaint the plaintiffs discovered that a petitioning creditor in the 1960-1961 bankruptcy proceeding was mistakenly identified as a California Corporation when, in fact, it was a Delaware Corporation which was qualified to do business in California.

There are four reasons why this rule is not applicable. The first is that the actual place of corporate domicile was of little significance in the bankruptcy proceeding. The heart of the bankruptcy proceeding was the indebtedness of Dudley Industrial Corporation to the creditors. This has not been denied. Secondly, the actual record of the corporate domicile would be a matter of public record having been filed with the California Secretary of State's office. (See plaintiff's Exhibit "E" TR. 155). Thirdly, the plaintiff consented to the bankruptcy. (TR. 209). Fourth, the alleged concealment does not meet the test of materiality with regard to his present claim against the defendants herein. In order to invoke the federal fraudulent concealment rule the plaintiffs must affirmatively show that there was a concealment of a substantial element of his claim or of the entire claim itself. *Moviecolor Limited v. Eastman Kodak Company* 288 F.2d 80 (2nd Cir. 1961), cert. denied in 368 U.S. 821. *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964).

VI

EVEN IF THE COMPLAINT IS NOT BARRED BY THE STATUTE OF LIMITATIONS, THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT.

The District Court dismissed the complaint on the grounds that it was barred by the statute of limitations. The Court did not decide whether the complaint stated a claim upon which relief could be granted. Plaintiffs, however, have argued extensively in their brief that the complaint states a claim upon which relief can be granted. Bank desires to answer the plaintiffs' arguments on this question briefly. Bank requests that if the Court finds that the statute of limitations is not a bar to the complaint that all parties be allowed the opportunity to fully argue the question before this Court or in the alternative that the matter be referred back to the District Court for further proceedings.

VII

NO CLAIM IS STATED UNDER SECTION 1982 OF THE FEDERAL CIVIL RIGHTS ACT BECAUSE NO RACIAL OR OTHER INVIDIOUS DISCRIMINATION IS ALLEGED.

The act provides in 42 U.S.C. §1982 as follows:

> "All citizens of the United States shall have the same rights in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) the Supreme Court held that §1982 dealt only

with racial discrimination. This position was reaffirmed the next year in *Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969) which concerned racial discrimination in housing.

Plaintiffs argue on appeal that the broad language used in *Griffen v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1791 (1972) should be applied to §1982. They acknowledged that *Griffen v. Breckenridge, supra,* dealt with an interpretation of §1985(3) which contains significantly different language than §1982 but base their argument on the legislative history of the entire civil rights legislation. Even if the Court were to look for a class-based, invidiously discriminatory animus as discussed in *Griffen v. Breckenridge, supra,* it would be impossible to place the plaintiffs in such a class. First, the plaintiffs have sued herein as individuals. They have not alleged that they represent a class of persons discriminated against nor have they claimed to represent all of the shareholders of Dudley Industrial Corporation. Secondly, the motive that is alleged for the actions of the defendants is stated to be that the defendants intended to drive Dudley Industrial Corporation out of the polyester fiberglass reinforced fixture market. This motive cannot reasonably be held to be within the purview of the civil rights legislation. The allegations, if true, would only constitute an improper business practice.

VIII

NO CLAIM IS STATED UNDER SECTION 1983 OF THE FEDERAL CIVIL RIGHTS ACT BECAUSE THE COMPLAINT FAILS TO ALLEGE STATE ACTION AND A DEPRIVATION OF A FEDERALLY PROTECTED RIGHT, PRIVILEGE OR IMMUNITY WITHIN THE MEANING OF THE STATUTE.

The act provides in 42 U.S.C. §1983 as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Courts have held that the phrase "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" to mean there must be some state action to bring the conduct of the defendants within the meaning of this section of the act. *Palacios v. Foltcz,* 441 F.2d 1196 (10th Cir. 1971). Plaintiffs have attempted to show state action by relying on alleged acts of co-conspirators none of whom we named as co-defendants.

The City of Hollister and the County of Riverside are alleged to be co-conspirators with the defendants. Their conduct which is alleged to be state action consists of the cancellation of certain leases owned by Dudley Industrial Corporation and the permitting of a take-over of these leases by the trustee in bank-

ruptcy. These actions are proprietory actions which any property owner might have taken. The fact that the lessors were governmental entities is purely fortuitous. There must be more than a casual relationship between the state power and the alleged misuse of power. The misuse of power must be possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *United States v. Classic,* 313 U.S. 299, 326 (1941) quoted with approval in *Monroe v. Pape,* 365 U.S. 167, 183-187 (1960).

Plaintiff's second theory of state action relates to the plaintiff's criminal conviction in the State Court for failure to pay wages. Defendant Grut is alleged to have supplied information to the Santa Clara District Attorney in order to bring about the plaintiff's prosecution. Where the defendants are private persons, it is necessary to show that the private persons acted "under color of law" either through a conspiracy with state officials or with sufficient state action to prove a violation of the plaintiff's Fourteenth Amendment rights. *Adickes v. Kress & Co.* 398 U.S. 144, (1970). Plaintiffs did not allege that the Santa Clara District Attorney was a co-conspirator. Neither did they allege that the state's application of the provisions of the California law discriminated against them. Lastly, the plaintiff has not alleged any state involvement in the precise object of the conspiracy. Therefore, the plaintiffs have not met the criteria for state action within the meaning of §1983 *Mullarkey v. Borglum,* 323 F.Supp. 1218 (S.D. N.Y. 1970).

The complaint also fails to meet the requirement of §1983 that there be a deprivation of a federally protected right, privilege or immunity. Plaintiffs claim that the defendants conspired to deprive them of their "constitutional right to engage in lawful business without interference . . ." (TR. 29, lines 18-25). It has been clear since the decision in the *Slaughter-House Cases,* 83 U.S. 36 (1872), that this type of right is not covered by §1983. That decision arose out of suits brought against the State of Louisiana, which had passed an act restricting the carrying on of the slaughterhouse business in a given geographical area to a small number of firms. The plaintiffs in that case argued that the ability to carry on the lawful business of a slaughterhouse, and, in fact, that the right to engage in any lawful endeavor, was one of the privileges and immunities secured by the Federal Constitution. The Supreme Court drew a distinction between the rights of state citizenship and the rights of national citizenship secured by the Federal Constitution, and held that the right to engage in business was not a right secured by the Federal Constitution. This view was followed by Mr. Justice Stone in a concurring opinion in *Hague v. C.I.O.,* 307 U.S. 496, 520 n.1 (1939), and in *Madden v. Kentucky,* 309 U.S. 83 (1940). *Glicher v. Michigan Liquor Control Commission,* 160 F.2d 96 (6th Cir. 1947), involved the revocation of a liquor license. The plaintiff unsuccessfully asserted that his rights, privileges and immunities under the Federal Constitution had been violated.

Plaintiffs cite *Griffen v. Breckenridge, supra,* for the argument that the rights, privileges or immunities protected by §1983 include the right to do business, which the plaintiffs have alleged they were deprived of by defendants. However, *Griffen v. Breckenridge, supra,* dealt with §1985(3), not with §1983. It did not modify the holdings that the rights, privileges or immunities protected by §1983 do not include the right to do business.

IX

NO CLAIM IS STATED UNDER § 1985 (3) OF THE CIVIL RIGHTS ACT BECAUSE PLAINTIFFS DO NOT FORM A CLASS TO BE PROTECTED FROM INVIDIOUS DISCRIMINATION.

The act provides in 42 U.S.C. §1985(3) as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure

> any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In *Griffen v. Breckenridge, supra,* the Supreme Court examined extensively the Congressional intent behind §1985(3). The Court found that §1985(3) was not intended to apply to all tortious activity or conspiratorial interferences with the rights of others, nor was it intended to punish any assault and battery committed by two or more persons. The Court determined that there must be more; there must be "as an element of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the amendment." 403 U.S. at 102. Thus, in construing the statute, the Court held that:

> "The language requiring intent to deprive of *equal* protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102.

Plaintiffs have not alleged that they are members of any class on the basis of which they have been dis-

criminated against by defendants. As discussed with reference to §1982 plaintiffs have not shown themselves to be part of a class but rather are individuals alleging an improper business conspiracy.

CONCLUSION

Bank respectfully submits that the judgment of dismissal based on the statute of limitations was proper and that even if the statute of limitations were not a bar to the plaintiffs' action, the complaint fails to state a claim upon which relief can be granted. For the above stated reasons the judgment of dismissal should be affirmed.

Dated, San Francisco, California,
May 3, 1973.

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ROBERT A. PADWAY,
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By THEODORE SACHSMAN,
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